

SUPREME COURT—In Equity.

S. KEROLOKANI VS. JAMES ROBINSON.

Chief Justice ALLEN delivered his decision, overruling the demurrer taken to the amended bill, as follows: It appears by the bill that Kalamoku entered into an agreement with the respondent in which he assigned to him, his heirs, executors, administrators and assigns, the wharf called the King's wharf, situated in Honolulu, and that said respondent, for himself, his heirs, executors, administrators and assigns, agreed to pay half of all expenses incurred in altering, repairing and improving said wharf, and to pay Kalamoku, his heirs, executors, administrators and assigns, one half of all the moneys received for the use of said wharf and premises, and said Kalamoku agreed to pay half of all the expenses incurred in altering, repairing and improving said wharf.

The agreement bears date January 11, 1827. Said respondent, in pursuance of said agreement, entered upon the premises, and has continued to occupy them till the day of filing the bill. The bill further alleges that the respondent presented to the Board of Land Commission a claim based on the above recited agreement, and the following record and award was made: (The said) respondent having set forth that he was deprived of a portion of the land supposed to be included in the agreement referred to, and His Excellency Mataio Keahi, at that time acting for the heir of Kalamoku, having agreed to add to the portion described thereafter as Part 1st, that described as Part 2d: "We accordingly confirm the claimant James Robinson, his heirs, executors, administrators and assigns, in the same rights and privileges in the lot commonly called the Point," and now including the additional piece under Part No. 2, as they are both designated in the surveys of T. Metcalf, as set forth in the award, as were granted in the original conveyance, and given in full in this award, and subject at the same time to the same rules and conditions as are therein contained, the whole instrument, as quoted, being now confirmed by this Board, in full application to the present claim, and correctly described in surveys of Part 1st and 2d.

It is further alleged in said bill, that said Kalamoku deceased, about October, in the year 1827, leaving as his sole heir his son, Lelieohoku, who inherited the property described in the agreement, and was accordingly held to be the heir of Kalamoku by the King, and was treated and considered as the inherit-er of the above described property, by the said respondent; that the said Lelieohoku was lawfully married to said complainant, and deceased intestate in the year 1848, leaving as his sole heir his son, John Pitt Kinau, who inherited the property described in the agreement, and was accordingly held to be the heir of Lelieohoku by the King, and was treated and considered as the inherit-er of the above described property, by the said respondent; that the said John Pitt Kinau deceased, in the year 1851, leaving as his sole heir his son, John Pitt Kinau, who inherited the property described in the agreement, and was accordingly held to be the heir of John Pitt Kinau by the King, and was treated and considered as the inherit-er of the above described property, by the said respondent; that the said John Pitt Kinau deceased, in the year 1859, leaving as his sole heir his son, John Pitt Kinau, who inherited the property described in the agreement, and was accordingly held to be the heir of John Pitt Kinau by the King, and was treated and considered as the inherit-er of the above described property, by the said respondent.

The complainant avers that there has been no settlement, as she verily believes, or account rendered, although she admits that small sums have from time to time been paid and that a large sum is now due.

To this bill there is a general demurrer—1st, on the ground that there was not at the time of the death of Kalamoku, any inheritable estate in the King's wharf, and that his son, Lelieohoku, could not have inherited the estate in question.

2d. The title to land in this Kingdom is founded upon a Land Commission Award, a Royal Patent, or the Mahele (division) Book of 1848.

It appears by the bill that Lelieohoku was the son and heir of Kalamoku, and that he inherited the property, and was acknowledged to be the heir of Kalamoku by the King, and was treated and considered as the inherit-er of the property in question, by the respondent himself. It appears further, that Lelieohoku was lawfully married to the complainant, and that he died intestate in the year 1848, leaving as his sole heir his son, John Pitt Kinau, who inherited the property, and was acknowledged to be the heir of Lelieohoku by the King, and was treated and considered as the inherit-er of the property in question, by the respondent.

And it is further averred by the bill, that John Pitt Kinau deceased, in the year 1851, leaving as his sole heir his son, John Pitt Kinau, who inherited the property, and was acknowledged to be the heir of John Pitt Kinau by the King, and was treated and considered as the inherit-er of the property in question, by the respondent.

It appears further, on the application of the respondent, that the rights of the parties under the contract were recognized and confirmed by the Land Commission in 1851, at which time a separate piece of land, called Lot No. 2 in the survey, was recognized as included in the contract, in lieu of a portion of the King's wharf, which had been taken possession of by the Government.

But it is said there was no law of inheritance at that time. I am of opinion that there was a common law of inheritance, like to be modified or defeated, but perfectly good until such an event. Therefore, by the bill, the title in Lelieohoku was complete.

I suppose that an inheritance recognized by the King, as alleged in the bill, would be valid at that time, even upon the theory of the counsel for the respondent.

As a right of inheritance, the bill, as the agreement itself recognizes it. The respondent admits by his agreement, that there was at that time a right of inheritance, and it is averred he held under Lelieohoku till his death, and he recognizes again the heirship of Kinau, the son of Lelieohoku, and his rightful heir.

The respondent admits by the demurrer, the agreement and the bill, and that he made a claim before the Land Commission for an award based on the agreement, and that the Land Commission did confirm the claimant—the present respondent—his heirs, executors, administrators and assigns, in the same rights and privileges in the lot called the Point, with the additional piece substituted for a portion of the original lot, called "The King's Wharf," as was granted in the original conveyance and given in full in the award, and subject at the same time to the same rules and conditions as are therein contained, the whole instrument being confirmed, in full, on application to the said Board.

In a word, the respondent, by his agreement, already admitted to, entered into the possession of the land, and enjoyed the same for more than thirty years, and recognized by his acts the son and heir of the original party to the agreement, and after some twenty-four years of uninterrupted possession, claims to be the owner of the land, and to have his rights confirmed under the agreement, and by mutual agreement, receiving the possession of a lot of land allotted to the complainant, as dower, in lieu of a portion of the King's wharf—the land referred to in the original agreement—which is done by the Board in 1851, since which time he has continued in the same uninterrupted possession, enjoyed without let or hindrance.

When a vendee obtains and keeps possession of land under a contract of sale, which is not fulfilled, he will be estopped from setting up a defect in the title, as a defense to an ejectment by the vendor, or on a suit for the purchase money.

Jackson & Hotchkiss, 6 Cowan, 401; in *Galloway vs. Turley*, 12 Peters, 264; it was held that a vendee who has gone into possession, under the vendor, is virtually in the position of a tenant, and will not only be precluded from using the defects in the vendor's title, to deprive him of the land without paying for it, but he will be compelled to make any steps which he may have taken to complete the title, subsequent to the purposes of the contract, instead of a mode of defeating it.

In *Chetlet & Pound, 1 Lo. Raymond*, it was decided that although the tenant may plead *non habuit in tenementis* to an action of debt for rent, he must fail at the trial if the landlord shows any interest, though limited to an estate at will, or a bare possession.

It is regarded now as settled doctrine in England and the United States, that a tenant can neither deny his landlord's title in ejectment, nor set up an outstanding or paramount title in himself or a third party.

Buller & Kelly, 25 Wend. 392; in *Jackson & Harper, 6 Wend.* 246. The tenant set up an outstanding title in a third person, holding directly by letters patent from the State, in an action of ejectment against him by his landlord, but the Court ruled that he was estopped from contesting the title under which he entered, as against his original landlord, or any other person who had acquired or succeeded to his title. He can no more show that the premises belonged to the State, than he can that this belonged to himself. In this case, letters patent from the State were produced, and a lease of the premises by the patentee to the defendant, still the Court ruled that he must first show the possession which he obtained from his landlord, and then as plaintiff he may avail himself of any title which he has been or may be to acquire. In this case no paramount title has been set up.

The estoppel is not limited to the original parties to the lease, but extends to all who come in under the tenant, or take by descent, or purchase from the tenant.

Lord Kenyon, in the case of *Cook vs. Laxley, 5 T. R.* 6, ruled that in an action for use and occupation, it ought not to be permitted to a tenant, who occupies land by license of another, to call upon him to show the title under which he let the land; and the only question is, whether in this case, as in that, the same

principles apply. Here the respondent entered into possession of the premises by an agreement with Kalamoku, from whom, as by inheritance, as the complainant alleges, the estate has descended to her son, and at his death, to his mother, and he now refuses to fulfill the terms of the contract under an idea that he may contest the plaintiff's title. It is a general rule that the tenant shall not dispute the landlord's title, and no exception to it has been shown as applicable to this case.

Judge Wilde, in the case of *George vs. Putney, 4 Cush.* 354, says that so long as the lessee is not disturbed in his occupation, he is bound by the contract to pay the rent, whether the lessor's title be defective or not.

It is equally clear that if the lessee is disturbed in his possession by a party having a paramount title, he is not liable. Any act equivalent to a ouster, is a defense of payment.

As the party cannot contest the title under which he holds, neither can he be the title of the heir. The bill alleges that Kalamoku died in 1827, leaving as his sole heir his son, Lelieohoku, who inherited the property described in the agreement, and was accordingly held to be the heir of Kalamoku by the King, and was treated and considered as the inherit-er of the said property by the respondent.

The full Court ruled in a demurrer to the bill before it was amended, that a party cannot controvert the principle applied to the heir when the lessor dies during the term, unless deprived of possession derived from his lessor by a paramount title, or when he was induced to accept possession from his lessor by fraud or mistake, and from some other exceptional cause, none of which have been shown which are applicable to this case.

The Court said that the party is not permitted to question the title under which he holds by virtue of the contract. The rights of the parties by the bill, are in question, and not a title adverse to the complainant. The Court feel it their duty to observe that these objections do not come with great force from a party who has been in undisturbed possession for thirty-four years and especially when the contract was formally recognized on the respondent's application by the Land Commission as applicable to the "King's wharf," and when the complainant herself appropriated a portion of land allotted to her as dower to make up for a portion of the land taken for Government uses from the "King's wharf."

It is an admitted principle of equity pleading that if any part of a bill is good, that a general demurrer to the whole bill cannot be sustained. The universal rule in Chancery is that the defendant may meet the plaintiff's bill by several modes of defense. He may demur, plead answer, and disclaimer; but if he demurs generally, when there is any equity in the bill or when he should have pleaded or answered any of the allegations, or should have disclaimed, the demurrer must be overruled.

It is a matter of history that when the Islands were ceded to the United States, the title to the lands was divided into the lands among the warrior-chiefs, and they divided the lands into two to their inferior chiefs, by whom they were sub-divided again and again; all these persons were considered to have rights in the lands, or the productions of them; all persons possessing landed property paid a land tax to the King, which he assessed at pleasure, and also service, which was called *lei* for discretion. The superior always had the power at pleasure to dispossess his inferior, but it was not considered just and right to do without cause, and dispossessed did not often take place except on the death of one of the landlords, when changes were often made, and the rights of heirs and tenants comparatively disregarded. It is very clear that heirs were recognized, and their rights continued until they in some mode were declared forfeit. The act of 1839 was designed to give additional protection to the persons of all the people, together with their lands, their building and their rights, and also service, which was called *lei* for discretion. The superior always had the power at pleasure to dispossess his inferior, but it was not considered just and right to do without cause, and dispossessed did not often take place except on the death of one of the landlords, when changes were often made, and the rights of heirs and tenants comparatively disregarded.

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By Authority.

Water Rates for the City of Honolulu.

[Established by the Interior Department this twenty-first June, A. D. 1862.]

SECTION 1. For every private house, store, or divided store, where water is used for drinking and washing purposes, \$10 per annum.

SECTION 2. For every private house or store where water is used for domestic purposes only, viz.: For cooking, bathing, drinking and washing, at the rate of \$15 per annum.

SECTION 3. For every hotel or boarding house where water is used for domestic purposes only, \$25 per annum.

SECTION 4. For every hotel or boarding house where water is used for irrigation as well or domestic purposes, \$35 per annum.

SECTION 5. For every store, or private house and lot, if not more than half an acre of land, where water is used for irrigation, as well as domestic purposes, \$25 per annum. [The hours for irrigation shall be from 6 to 9 A. M. and from 4 to 7 P. M.]

SECTION 6. For every store, or private house and lot, of more than half an acre, and not more than an acre, of land, where water is used for irrigation, as well as domestic purposes, \$35 per annum. [The hours for irrigation shall be from 6 to 9 A. M., and from 4 to 7 P. M.]

SECTION 7. For every mill and machine shop where water is used to supply a steam boiler—for each steam engine of four horse power, or less, \$20 per annum; and for every extra horse power, \$5. Water when used for manufacturing purposes, or otherwise, to be charged as per special agreement.

SECTION 8. For all lots, where there are several houses, and where more than one family resides, each house will be charged as provided in sections 1 and 2.

SECTION 9. The sum of \$10 will be charged for each fountain in addition to the rates above mentioned.

[Under the foregoing sections there shall be inserted into the lead pipe connecting with the main, three feet of pipe, or tops in the main pipe, of the following sizes: For sections 1 and 8, 1-4 inch pipe; section 2, 3-8 inch pipe; sections 3 and 5, 1-2 inch pipe; sections 4, 6 and 7, 3-4 inch pipe.]

The above rates payable semi-annually in advance. SECTION 10. Water supplied to the shipping, under 300 barrels, 124 cents per barrel; over 300 barrels, 64 cents per barrel.

Any person found supplying his neighbors with water under the present rates, or found running water for irrigation purposes, after the hours above specified, will forfeit the unexpired term of his water privilege. In all cases of fire, those parties who have the right of irrigation or to a fountain privilege, are expected immediately to stop their water, under the penalty of losing their privilege.

No one but the person appointed by the Superintendent shall be allowed to tap the main or branch pipes.

As no correct idea can be formed of the quantity of water consumed by those parties who take water from the Government pipes, these rates have been adopted for the time being, and will be altered as soon as water meters have been procured, when the consumers will be charged per gallon for the water used by them.

All applications for water privileges to be made to the Superintendent of Water Works.

L. KAMEHAMEHA, Minister of the Interior.

JOINT RESOLUTION.

BE IT ENACTED BY THE KING, THE NOBLES AND REPRESENTATIVES OF THE HAWAIIAN ISLANDS, IN LEGISLATIVE COUNCIL assembled: That the sum of six thousand dollars (\$6000) be and the same is hereby appropriated out of the public moneys for the purpose of defraying the necessary expenses of the Legislature of 1862.

Approved this 17th day of May, A. D. 1862.

KAMEHAMEHA, KAHELANA.

AN ACT TO ADMIT PLATE AND PIG IRON DUTY FREE.

BE IT ENACTED BY THE KING, THE NOBLES AND REPRESENTATIVES OF THE HAWAIIAN ISLANDS, IN LEGISLATIVE COUNCIL assembled: That the sum of six thousand dollars (\$6000) be and the same is hereby appropriated out of the public moneys for the purpose of defraying the necessary expenses of the Legislature of 1862.

Approved this 17th day of May, A. D. 1862.

KAMEHAMEHA, KAHELANA.

AN ACT TO AMEND THE LAW RELATING TO JURIES AND TRIAL BY JURY.

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Approved this 17th day of May, A. D. 1862.

KAMEHAMEHA, KAHELANA.

AN ACT TO AMEND ARTICLE XLII OF THE CIVIL CODE—OF THE GARNISHEE PROCESS TO FACILITATE THE COLLECTION OF DEBTS.

BE IT ENACTED BY THE KING, THE NOBLES AND REPRESENTATIVES OF THE HAWAIIAN ISLANDS, IN LEGISLATIVE COUNCIL assembled: That the sum of six thousand dollars (\$6000) be and the same is hereby appropriated out of the public moneys for the purpose of defraying the necessary expenses of the Legislature of 1862.

Approved this 17th day of May, A. D. 1862.

KAMEHAMEHA, KAHELANA.

AN ACT TO AMEND SECTION 1025 OF THE CIVIL CODE, TO EXEMPT CERTAIN PROPERTY FROM LEVY UNDER EXECUTION.

BE IT ENACTED BY THE KING, THE NOBLES AND REPRESENTATIVES OF THE HAWAIIAN ISLANDS, IN LEGISLATIVE COUNCIL assembled: That the sum of six thousand dollars (\$6000) be and the same is hereby appropriated out of the public moneys for the purpose of defraying the necessary expenses of the Legislature of 1862.

Approved this 17th day of May, A. D. 1862.

KAMEHAMEHA, KAHELANA.

AN ACT TO PREVENT MARRIED PERSONS FROM DESERTING ONE ANOTHER, PASSED AUGUST 25th, 1860.

BE IT ENACTED BY THE KING, THE NOBLES AND REPRESENTATIVES OF THE HAWAIIAN ISLANDS, IN LEGISLATIVE COUNCIL assembled: That the sum of six thousand dollars (\$6000) be and the same is hereby appropriated out of the public moneys for the purpose of defraying the necessary expenses of the Legislature of 1862.

Approved this 17th day of May, A. D. 1862.

KAMEHAMEHA, KAHELANA.

AN ACT TO ABOLISH THE PUNISHMENT OF WOMEN WHO BECOME PREGNANT BY ILLEGAL INTERCOURSE.

BE IT ENACTED BY THE KING, THE NOBLES AND REPRESENTATIVES OF THE HAWAIIAN ISLANDS, IN LEGISLATIVE COUNCIL assembled: That the sum of six thousand dollars (\$6000) be and the same is